

Licensing of computer software meeting all of the criteria in subsection (a)(1) of Section 130.1935, will not be subject to Retailers' Occupation Tax and neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax. See Ill. Adm. Code 130.1935(a)(1). (This is a GIL).

July 8, 2004

Dear Xxxxx:

This letter is in response to your letter dated March 3, 2003, received by our office March 10, 2004, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I was advised by a tax representative of the State of Illinois to contact your office to ask for a ruling.

I work for a distribution facility in the State of Illinois and have recently received a letter from a vendor of ours that is currently going through an Illinois audit. This vendor is requesting use tax information on a License Agreement that we currently have with them. This agreement has been an ongoing agreement and is renewable each year.

My argument is that the attached document is a License & Service agreement. According to Illinois Department Revenue Code (8Ill.Adm.Code 130.1935 (a), this is not taxable. Back in 1992, we also went through an Illinois Tax audit and this same agreement by the same company was reviewed by the auditor and was deemed non-taxable.

We are requesting a ruling to notify our vendor of the status of this issue.

Please feel free to contact me if you need any additional information.

Thank you for your attention to this matter.

DEPARTMENT'S RESPONSE:

Generally, sales of "canned" computer software are taxable retail sales in Illinois. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See subsection (c) of 86 Ill. Adm. Code 130.1935. Sales of canned computer software are taxable regardless of the means of delivery. For instance, the transfer or sale of canned computer software downloaded electronically would be taxable.

If transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under subsection (c) of Section 130.1935, they may not be taxable. But, if maintenance agreements provide for updates of canned software, and the charges for those updates are not separately stated and taxed, then the whole agreement would be taxable as sales of canned software.

In the context of a general information letter, and without binding the Department or its agents, it appears the licensing and software agreement attached to your letter meets the criteria as set out under subsection (a)(1) of Section 130.1935, and neither the transfer of the software nor the subsequent software updates would be subject to Retailers' Occupation Tax. Please note that the Illinois Legislature is currently considering the taxation of license of computer software. We recommend that you check the Department's website in the next 30-60 days for further information.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

EEB:msk